IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 63049-1-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
MICHAEL DARREL MILAM,	)	PUBLISHED IN PART
	)	
Appellant.	)	FILED: April 5, 2010
	)	
	)	

Cox, J. — Michael Milam appeals his judgment and sentence for second degree theft and second degree identify theft, claiming that his convictions violate the constitutional prohibition against double jeopardy. Because the two crimes are not the same in law under the "same evidence" test, we disagree and affirm.

In October 2007, Milam used a stolen automated teller machine (ATM) card and personal identification number (PIN) to withdraw $360 from an ATM. The State charged him with second degree theft and second degree identity theft. A jury convicted him as charged.

The trial court imposed a standard range Drug Offender Sentencing Alternative (DOSA) sentence and ordered Milam to pay a $500 Victim Penalty Assessment and a $100 DNA collection fee. The court waived all non-

mandatory costs, fees, and assessments.

Milam appeals.

DOUBLE JEOPARDY

Milam argues that his convictions for second degree theft and second degree identity theft, based on his use of a stolen ATM card and PIN to withdraw $360 from an ATM, violate double jeopardy. We disagree.

The State may bring multiple charges arising from the same criminal conduct in a single proceeding.[1] But the double jeopardy clauses of the United States and Washington State Constitutions protect against multiple punishments for the same offense.[2]

If a defendant's acts support charges under two different criminal statutes, we must determine whether the legislature intended to authorize multiple punishments for the crimes in question.[3] If the applicable statutes expressly permit multiple punishments, there is no violation of double jeopardy.[4]

If the statutes do not speak to multiple punishments for the same act, we turn to the "same evidence" rule of construction.[5] Multiple convictions violate

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[1] State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005).

[2] U.S. Const. amend. V; Wash. Const. art. I, § 9; State v. Gocken, 127 Wn.2d 95, 100, 896 P.2d 1267 (1995).

[3] State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995); Freeman, 153 Wn.2d at 771.

[4] Freeman, 153 Wn.2d at 771-73; State v. Hughes, 166 Wn.2d 675, 681-82, 212 P.3d 558 (2009).

[5] Hughes, 166 Wn.2d at 681-82.

double jeopardy under the "same evidence" test if they are the same "in law" and "in fact."[6] "If each offense includes an element not included in the other, and each requires proof of a fact the other does not, then the offenses are not constitutionally the same under this test."[7]

Even if the two statutes pass the "same evidence" test, multiple convictions may not stand if the legislature has otherwise clearly indicated its intent that the same conduct or transaction should not be punished under both statutes.[8]

We review de novo whether multiple punishments violate the constitutional protections against double jeopardy.[9]

Legislative Intent

The first question is whether the legislature intended to punish separately identity theft and second degree theft. We conclude that neither of the former versions of these statutes that were in effect in October 2007[10] expresses a clear legislative intent to authorize punishment under both statutes for the same act or transaction.

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[6] State v. Louis, 155 Wn.2d 563, 569, 120 P.3d 936 (2005).

[7] Hughes, 166 Wn.2d at 682 (citing State v. Jackman, 156 Wn.2d 736, 747, 132 P.3d 136 (2006)).

[8] Jackman, 156 Wn.2d at 746.

[9] State v. Daniels, 160 Wn.2d 256, 261, 156 P.3d 905 (2007).

[10] State v. Brewster, 152 Wn. App. 856, 859, 218 P.3d 249 (2009) (Under the common law, pending cases must be decided according to the law in effect "at the time of the decision." (quoting State v. Zornes, 78 Wn.2d 9, 12, 475 P.2d 109 (1970))).

Former RCW 9.35.020 (2004), the statute defining identity theft in effect in October 2007, provided in relevant part:

> (1) No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime.
>
> . . .
>
> (3) Violation of this section when the accused or an accomplice uses the victim's means of identification or financial information and obtains an aggregate total of credit, money, goods, services, or anything else of value that is less than one thousand five hundred dollars in value, or when no credit, money, goods, services, or anything of value is obtained shall constitute identity theft in the second degree. Identity theft in the second degree is a class C felony punishable according to chapter 9A.20 RCW.

Former RCW 9A.56.040(1)(a) (2007), the statute defining theft in the second degree in effect in October 2007, provided in relevant part:

> (1) A person is guilty of theft in the second degree if he or she commits theft of:
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> (a) Property or services which exceed(s) two hundred and fifty dollars in value, . . . other than a firearm as defined in RCW 9.41.010 or a motor vehicle.

"Theft" was defined then, as it is now, as "[t]o wrongfully obtain or exert unauthorized control over the property . . . of another . . . with intent to deprive him or her of such property…."[11]

There is nothing in either of these statutes that either party has called to our attention that shows a legislative intent to authorize multiple punishments for these offenses. Thus, we must next apply the "same evidence" test to determine

[11] RCW 9A.56.020(1)(a).

if the two offenses are the same "in law" and "in fact."[12]

"Same Evidence" Test

This test has both a legal prong and factual prong. "If each offense includes an element not included in the other, and each requires proof of a fact the other does not, then the offenses are not constitutionally the same under this test" and the double jeopardy clause does not prevent convictions for both offenses.[13]

The State does not dispute that the factual prong of this test is satisfied. The same acts proved both crimes in this case. Here, the charge for second degree identity theft was that Milam used another's financial information—an ATM card and PIN—to steal $360. The jury convicted him as charged. Likewise, the jury also convicted him of theft based on the same $360. But this factual analysis does not end our inquiry. We next consider whether the two crimes are also the same in law.

Theft in the second degree required proof that the defendant wrongfully deprived another person of property with a value between $250 and $1,500.[14] Thus, value is an essential element of that crime.

On the other hand, second degree identity theft required proof that the

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[12] Calle, 125 Wn.2d at 777; Freeman, 153 Wn.2d at 772.

[13] Hughes, 166 Wn.2d at 682 (citing Jackman, 156 Wn.2d at 747).

[14] RCW 9A.56.040(1)(a) (2007); RCW 9A.56.020(1)(a) (2004).

defendant knowingly obtained, possessed, used or transferred a means of identification or financial information with ***intent*** to commit another crime.[15] Commission of another crime was not an element of the identity theft statute. The supreme court made this clear in State v. Baldwin.[16]

There, Baldwin was convicted of three counts of identity theft and two counts of forgery.[17] He challenged the multiple convictions on the basis that they violated the prohibition against double jeopardy.[18] This court disagreed.[19] On review, the supreme court followed the same analysis that we do here, concluding that the same evidence test was not satisfied.[20] Specifically, the court cited this court with approval, stating: "[I]dentity theft only 'requires use of a means of identification with the ***intent*** to commit an unlawful act.'"[21]

The identity theft statute that was before the court in that case was former RCW 9.35.020 (1999). There is no material difference between the identify theft statute on which the supreme court relied in Baldwin and the 2004 version of the statute that is now before us for purposes of the same evidence test.[22] Both

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[15] RCW 9.35.020 (2004).

[16] 150 Wn.2d 448, 78 P.3d 1005 (2003).

[17] Id. at 451.

[18] Id. at 453.

[19] Id. at 455.

[20] Id.

[21] Id. (quoting former RCW 9.35.020 (1999)).

[22] Compare RCW 9.35.020(1) (1999) ("No person may knowingly use or knowingly transfer a means of identification of another person with the intent to

statutes required proof of a knowing use of financial information of another with the ***intent*** to commit a crime. In contrast, second degree theft required proof that one wrongfully obtained the property of another with intent to deprive him or her of the property.[23] The elements of identity theft and second degree theft were not the same in law.

Milam argues that in this case, "proof of theft of property, money in this case, was also an element of second degree identity theft under [former RCW 9.35.020 (2004)]."[24] That is not the case.

As this court held in State v. Leyda,[25] the reference to value in the second degree identity theft statute, "establishes a ceiling above which the offense is elevated to a higher degree, not a floor that must exist to support the charge or conviction. Thus, value is not an essential element of [second degree identity theft], and need not be alleged in the charging document or included in jury instructions" in order to obtain a conviction.[26] Again, the version of the identity theft statute that was before the Leyda court is not materially different from the

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commit, or to aid or abet, any unlawful activity harming or intending to harm the person whose identity is used, or for committing any felony.") with RCW 9.35.020(1) (2004) ("No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime.").

[23] RCW 9A.56.040(1)(a) (2007); RCW 9A.56.020(1)(a) (2004).

[24] Brief of Appellant at 10.

[25] 122 Wn. App. 633, 94 P.3d 397 (2004), reversed in part on other grounds, 157 Wn.2d 335, 138 P.3d 610 (2006).

[26] Id. at 640.

version of the statute now before us.[27] In short, proof of theft of $360 was not an essential element of second degree identity theft.

Relying on State v. Hughes,[28] Milam argues that where statutory elements of different crimes are not facially identical, close consideration may reveal the differences to be illusory. Hughes does not command a different result here.

Hughes was convicted of one count of rape of a child in the second degree and one count of rape in the second degree based on the victim's inability to consent.[29] Both charges were based on a single act of sexual intercourse with a child.[30] There, the court considered whether the two statutes contained language that, on closer consideration, showed similar elements.[31] The court held that although the elements of the crimes were facially different, both statutes protected individuals who are unable to consent by reason of their status and therefore were the same in law.[32]

Here, on the other hand, Milam attempts to use jury instructions to demonstrate that the distinction between his two crimes is illusory based on the

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[27] Compare RCW 9.35.020(1) (2001) with RCW 9.35.020(1) (2004) (both stating "No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime.").

[28] 166 Wn.2d 675, 212 P.3d 558 (2009).

[29] Id. at 679.

[30] Id.

[31] Id. at 683-84.

[32] Id. at 684.

fact that the "to convict" instruction for the charge of second degree identity theft read as follows:

> To convict the defendant of the crime of identity theft in the second degree, as charged in count 2, each of the following elements of the crime must be proved beyond a reasonable doubt:
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> (1) That on or about the 8th of October, 2007, the defendant obtained or possessed or used financial information of another person, living or dead;
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> (2) That the defendant did so with the intent to commit, or to aid or abet, any crime;
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> ***(3) That the defendant used that financial information and obtained an aggregate total of money less than [$1,500]***.[33]

State v. Hickman[34] requires the State to prove all of the elements in a "to convict" instruction, whether or not those elements are statutory elements.[35] But nothing in either Hughes or Hickman requires a departure from the traditional double jeopardy analysis comparing the elements of the crimes, as stated in the statutes.

When a single trial and multiple punishments for the same act or conduct are at issue, the dispositive question is whether the legislature intended to punish both crimes separately.[36] The focus of the "same evidence" test is on the statutory provisions at issue: "whether each provision *requires proof of a fact*

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[33] Clerk's Papers at 63 (emphasis added).

[34] 135 Wn.2d 97, 954 P.2d 900 (1998).

[35] Id. at 102.

[36] Freeman, 153 Wn.2d at 771-72.

which the other does not."[37] Here, the elements of the two statutes are different and that difference is not illusory.

Based on the above analysis, we conclude that second degree identity theft and second degree theft are not the same in law. Each "contains an element that the other does not, [thus] we presume that the crimes are not the same offense for double jeopardy purposes."[38]

A defendant may rebut this presumption with other evidence of legislative intent.[39] Thus, the remaining question is whether there are other clear indications that the legislature intended not to allow multiple punishments for second degree theft and second degree identity theft.[40] Multiple convictions may not stand if the legislature has otherwise clearly indicated its intent that the same conduct or transaction should not be punished under both statutes.[41]

Milam offers no evidence to show that the legislature did not authorize multiple punishments for these two offenses. Thus, no further inquiry is required.

For these reasons, we conclude that Milam's convictions do not violate the constitutional prohibitions against double jeopardy.

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[37] In re Pers. Restraint of Orange, 152 Wn.2d 795, 817, 100 P.3d 291 (2004).

[38] Freeman, 153 Wn.2d at 772 (citing Calle, 125 Wn.2d at 778).

[39] Id.

[40] State v. Womac, 160 Wn.2d 643, 652, 160 P.3d 40 (2007).

[41] Jackman, 156 Wn.2d at 746.

The State argues that the legislature's amendment of RCW 9.35.020, the identify theft statute, in 2008 to include an anti-merger provision evidences its intent that prior versions of the statute should be construed to authorize multiple punishments. Because we have decided the double jeopardy issue on the basis of the "same evidence" test, we need not reach this alternative argument.

We affirm the judgment and sentence.

The balance of this opinion has no precedential value. Accordingly, pursuant to RCW 2.06.040, it shall not be published.

DNA COLLECTION FEE

Milam argues that the trial court should have exercised discretion in deciding whether to impose the DNA collection fee because the fee was not mandatory at the time he committed his offense in October 2007. In the alternative, he argues that application of the amended DNA collection fee statute, making the fee mandatory after his offense, violates the prohibition against ex post facto laws. Finally, he argues that his trial counsel was ineffective for failing to object to the imposition of the DNA collection fee based on the above claims. These arguments are unpersuasive.

In 2002, the legislature enacted a statute requiring courts to impose a $100 DNA collection fee with every sentence imposed under chapter 9.94A RCW for certain specified crimes, "unless the court finds that imposing the fee would result in undue hardship on the offender."[42] In 2008, the legislature

[42] Former RCW 43.43.7541 (2002); State v. Thompson, 153 Wn. App. 325, 336, 223 P.3d 1165 (2009) (quoting former RCW 43.43.7541 (2002)).

amended the statute to make the fee mandatory regardless of hardship.[43] The amendment took effect on June 12, 2008.[44]

Milam committed his offense on October 8, 2007, and was sentenced on January 26, 2009. Based on the saving statute, RCW 10.01.040, and other authorities,[45] Milam contends the former DNA collection fee statute controls.

This court has addressed the same arguments in two recent cases: State v. Brewster[46] and State v. Thompson.[47] The defendants in both cases, like Milam, committed their offenses before the effective date of the 2008 amendment.

In Brewster, the defendant argued that the saving statute, RCW 10.01.040, barred the application of the new statute to her.[48] Under the saving statute, criminal cases generally must be prosecuted and decided according to the law in effect at the time of the offense.[49] But this court held that Brewster was subject to the version of the statute in effect at the time of her sentencing

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[43] RCW 43.43.7541; Thompson, 153 Wn. App. at 336.

[44] Laws of 2008, ch. 97, § 3; Thompson, 153 Wn. App. at 336.

[45] RCW 9.94A.345; State v. Christensen, 153 Wn.2d 186, 102 P.3d 789 (2004); State v. Humphrey, 139 Wn.2d 53, 983 P.2d 1118 (1999); State v. Theriot, 782 So.2d 1078 (La. Ct. App. 2001); Black's Law Dictionary 661 (7th ed. 1999).

[46] 152 Wn. App. 856, 218 P.3d 249 (2009).

[47] 153 Wn. App. 325, 223 P.3d 1165 (2009).

[48] Brewster, 152 Wn. App. at 859.

[49] Id. (quoting RCW 10.01.040).

because the DNA collection fee is not punitive and the saving statute applies only to criminal and penal statutes.[50]

In Thompson, this court held that the state and federal constitutional prohibitions against ex post facto laws do not provide a basis for avoiding the application of the 2008 statutory amendment.[51] Again, this is because the ex post facto clauses of the federal and state constitutions apply only to punitive laws, and the DNA fee is not punitive.[52]

Brewster and Thompson control. The trial court properly imposed the mandatory fee.

INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, Milam argues that his counsel was ineffective for not arguing that the prior version of the DNA collection fee statute controlled. For the reasons this court stated in Brewster, there was no deficient performance by Milam's counsel in this case.[53]

We affirm the judgment and sentence.

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[50] Id. at 859, 861.

[51] Thompson, 153 Wn. App. at 337.

[52] Id.

[53] See Brewster, 152 Wn. App. at 861.

Cox, J.

WE CONCUR:

Schindler, C.J. Appelwick, J.